No. 75-1803

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

RONALD HACKENBERGER d/b/a
RON'S TRUCKING SERVICE, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A2-A4) is not reported. The Board's decision and order (Pet. App. A4-A28) are reported at 217 NLRB No. 128.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1976 (Pet. App. A2). A petition for rehearing *en banc* was denied on April 27, 1976 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on June 11, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in unfair labor practice proceedings, an employer is entitled to obtain a list of witnesses that the General Counsel intends to call and to take depositions for the purpose of discovery.[1]

STATUTE AND REGULATIONS INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), and of the Board's Rules and Regulations are set forth in the Appendix, *infra,* pp. 1a-5a.

STATEMENT

In July 1974, petitioner hired William Brown as a truck driver (Pet. App. A10). Brown thereafter met with Union[2] representatives to discuss the possibility of organizing the Company; petitioner learned of the meeting (Pet. App. A10-A11). Subsequently, Brown discussed the Union with various employees and solicited their signatures on union authorization cards (Pet. App. A11); petitioner also learned of these solicitations (Pet. App. A12 and n. 4, A23). On September 24, 1974, petitioner reprimanded Brown for failing to report for work on the previous Sunday, and stated that Brown had become a "union agitator," and that he was fired (Pet. App. A12).

Brown thereafter filed an unfair labor practice charge with the Board. On November 8, 1974, the Board issued a complaint, alleging that the Company had violated Section 8(a)(3) and (1) of the Act by discharging Brown

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[1]A similar question is presented in *Valley Mold Company, Inc.* v. *National Labor Relations Board*, No. 75-1661, which is now pending before this Court on petition for a writ of certiorari.

[2]Local Union No. 20 of the International Brotherhood of Teamsters.

because of his Union activities (Pet. App. A6), and notifying the Company that a hearing was scheduled for December 5, 1974 (Pet. App. A8; C.A. App. 25-28, 55).[3]

On November 22, 1974, the Company filed with the Regional Director a request for a list of witnesses that the General Counsel intended to call at the hearing; notified the Regional Director that "pursuant to Section 10(b) of the LMRA and pursuant to Rule 30, Federal Rules of Civil Procedure" the Company intended to depose William Brown and reserved the right to depose other witnesses to be called (C.A. App. 36); and moved for a continuance of the hearing on the ground, *inter alia*, that the Company needed time in which to complete such prehearing discovery (Pet. App. A7; C.A. App. 35). The Regional Director, treating the Company's notice of intent to take depositions as a request for permission to do so, denied this request and the request for a witness list on the ground that the Company had failed to show "good cause" for taking such depositions as required by the Board's Rules and Regulations (29 C.F.R. 102.30; App., *infra,* pp. 1a-2a), and further denied the Company's motion for a continuance (C.A. App. 39-40).

At the commencement of the hearing before the Administrative Law Judge, the Company renewed its motion for discovery of the list and for a continuance to depose witness (Pet. App. A7; C.A. App. 52-58).[4] The Law

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[3]"C.A. App." refers to the appendix filed in the court of appeals, a copy of which has been lodged with the Clerk of this Court.

[4]The Law Judge assured the Company, however, that he would reconsider the request for a continuance to depose witnesses if complex or unforeseen issues were raised in the General Counsel's case (Pet. App. A8; C.A. App. 58). At no time during the hearing did the Company renew its request for a continuance to depose witnesses or indicate that it was surprised or handicapped by lack of preparation (Pet. App. A8).

Judge denied these requests, and thereafter found that the Company had violated Section 8(a)(3) and (1) of the Act by discharging Brown for his Union activities rather than for his failure to appear for work (Pet. App. A10-A24).[5]

The Company thereafter filed exceptions with the Board. The Board rejected the Company's contention that the denials of its motions for discovery of the witness list and for a continuance to take depositions deprived it of due process (Pet. App. A4-A5, A6-A8), and affirmed the Law Judge's finding that Brown had been discharged for his Union activities. The Board ordered the Company, *inter alia*, to reinstate Brown with backpay (Pet. App. A4-A5, A25-A27).

The court of appeals enforced the Board's order (Pet. App. A2-A4), relying upon its recent decision in *National Labor Relations Board* v. *Valley Mold Company, Inc.*, 530 F. 2d 693,[6] in which it held that there is no entitlement to discovery in such administrative proceedings.

ARGUMENT

1. Petitioner contends (Pet. 10-13) that it was denied due process by the denial of its requests to obtain a list of witnesses that the General Counsel intended to call at the unfair labor practice hearing, and for a continuance to take prehearing depositions of Brown and any other witnesses to be called. It is established, however, that the Fifth Amendment does not require that parties to Labor Board proceedings be permitted such prehearing discovery. *National Labor Relations Board* v. *Valley Mold*

[5]The General Counsel called five witnesses, including petitioner, Brown, two other employees, and a Union representative (C.A. App. 61, 84, 85, 104, 106).

[6]See n. 1, *supra*.

Company, Inc., supra; *National Labor Relations Board* v. *Interboro Contractors, Inc.*, 432 F. 2d 854, 857-858 (C.A. 2), certiorari denied, 402 U.S. 915; cf. *Starr* v. *Commissioner*, 226 F. 2d 721, 722 (C.A. 7), certiorari denied, 350 U.S. 993.[7]

2. The Administrative Law Judge did not abuse his discretion in denying petitioner's requests for a witness list and continuance for the purpose of taking prehearing depositions. Board Rule 102.30(a) (29 C.F.R. 102.30(a); App., *infra*, pp. 1a-2a), provides that an Administrative Law Judge may permit prehearing depositions "if in his discretion good cause has been shown." Here, the Company had full opportunity at the hearing to cross-examine every witness called by the General Counsel. Moreover, the Law Judge assured the Company that it could renew its request for a continuance to depose witnesses should it be surprised by the General Counsel's evidence; the Company did not renew its request. Accordingly, petitioner was not prejudiced by its inability to depose witnesses.[8]

[7]Petitioner's reliance on *Morgan* v. *United States*, 304 U.S. 1, and *Hannah* v. *Larche*, 363 U.S. 420, is misplaced. In *Morgan* the Court held that a litigant before an administrative agency has a right to "know the claims * * * presented and to contest them." 304 U.S. at 22. Petitioner was fully afforded that opportunity here. In *Hannah*, the Court held that, in the specific administrative proceeding there involved, which was solely investigative, the person investigated did not have a right to confront and cross-examine accusers and to know the specific charges against him. Petitioner was afforded those rights here.

[8]The only "prejudice" asserted by petitioner from its inability to depose witnesses here was the resulting denial of an opportunity to obtain "information necessary to discredit an opposing witness" and "advance notice of the position which his adversary is taking" (Pet. 16). These disadvantages presumably are shared by all litigants in administrative proceedings who are not entitled to prehearing discovery, however, and therefore did not constitute particular prejudice to petitioner.

Contrary to petitioner's contention (Pet. 13-17), there is no conflict among the circuits on this issue. Although the circuits are in some disagreement as to the appropriate scope of the Law Judge's discretion to find "good cause" to permit depositions,[9] there is no disagreement that refusal to permit depositions in an unfair labor practice proceeding is not an abuse of discretion where, as here, there has been no prejudice. *Electromec Design and Development Company* v. *National Labor Relations Board*, 409 F. 2d 631, 635 (C.A. 9); *National Labor Relations Board* v. *Rex Disposables*, 494 F. 2d 588, 592 (C.A. 5); *Winn-Dixie Stores, Inc.* v. *National Labor Relations Board*, 413 F. 2d 1008, 1010 (C.A. 5); *National Labor Relations Board* v. *Gleason*, 534 F. 2d 466, 481 (C.A. 2).

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[9]The Second Circuit and the Board have held that, under the Board's rules, an Administrative Law Judge may find "good cause" to permit the taking of depositions only when the witness to be deposed is likely to be unavailable at the hearing. *National Labor Relations Board* v. *Interboro Contractors, Inc., supra*, 432 F. 2d at 860-861; the Fifth Circuit has held that the Law Judge has discretion to find "good cause" so long as depositions are practicable under the circumstances and they are not used to harass or coerce employees. *National Labor Relations Board* v. *Miami Coca-Cola Bottling Company*, 403 F. 2d 994, 996. See also *National Labor Relations Board* v. *Safway Steel Scaffolds Company of Georgia*, 383 F. 2d 273, 277 (C.A. 5).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

The relevant provision of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat 519, 29 U.S.C. 151, *et seq.*), is as follows:

SECTION 10.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: * * * Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to [Section 2072 of Title 28].

The relevant provisions of the National Labor Relations Board Rules and Regulations (29 C.F.R. 102.1, *et seq.*) are as follows:

SEC. 102.30 *Examination of witnesses; depositions.*—Witnesses shall be examined orally under oath, except that for good cause shown after the issuance of a complaint, testimony may be taken by deposition.

(a) Applications to take depositions shall be in writing setting forth the reasons why such depositions should be taken, the name and post

office address of the witness, the matters concerning which it is expected the witness will testify, and the time and place proposed for the taking of the deposition, together with the name and address of the person before whom it is desired that the deposition be taken (for the purposes of this section hereinafter referred to as the "officer"). Such application shall be made to the regional director prior to the hearing, and to the administrative law judge during and subsequent to the hearing but before transfer of the case to the Board pursuant to section 102.45 or section 102.50. Such application shall be served upon the regional director or the administrative law judge, as the case may be, and upon all other parties, not less than 7 days (when the deposition is to be taken within the continental United States) and 15 days (if the deposition is to be taken elsewhere) prior to the time when it is desired that the deposition be taken. The regional director or administrative law judge, as the case may be, shall upon receipt of the application, if in his discretion good cause has been shown, make and serve upon the parties an order which will specify the name of the witness whose deposition is to be taken and the time, the place, and the designation of the officer before whom the witness is to testify, who may or may not be the same officer as that specified in the application. Such order shall be served upon all the other parties by the regional director or upon all parties by the administrative law judge.

(b) Such deposition may be taken before any officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, including any agent of the Board authorized to administer oaths. If the

examination is held in a foreign country, it may be taken before any secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States.

(c) At the time and place specified in said order the officer designated to take such deposition shall permit the witness to be examined and cross-examined under oath by all the parties appearing, and his testimony shall be reduced to typewriting by the officer or under his direction. All objections to questions or evidence shall be deemed waived unless made at the examination. The officer shall not have power to rule upon any objections but he shall note them upon the deposition. The testimony shall be subscribed by the witness in the presence of the officer who shall attach his certificate stating that the witness was duly sworn by him, that the deposition is a true record of the testimony and exhibits given by the witness, and that said officer is not of counsel or attorney to any of the parties nor interested in the event of the proceeding or investigation. If the deposition is not signed by the witness because he is ill, dead, cannot be found, or refuses to sign it, such fact shall be included in the certificate of the officer and the deposition may then be used as fully as though signed. The officer shall immediately deliver an original and two copies of said transcript, together with his certificate, in person or by registered mail to the regional director or the administrative law judge, care of the chief administrative law judge in Washington, D.C., or associate chief administrative law judge, San Francisco, Calif., as the case may be.

(d) The administrative law judge shall rule upon the admissibility of the deposition or any part thereof.

(e) All errors or irregularities in compliance with the provisions of this section shall be deemed waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is or, with due diligence, might have been ascertained.

(f) If the parties so stipulate in writing, depositions may be taken before any person at any time or place, upon any notice and in any manner, and when so taken may be used like other depositions.

* * * * *

SEC. 102.118 *Board employees prohibited from producing files, records, etc., pursuant to subpoena ad testificandum or subpoena duces tecum; prohibited from testifying in regard thereto; production of witnesses' statements after direct testimony.*

(a) Except as provided in section 102.117 of this part respecting requests cognizable under the Freedom of Information Act, no regional director, field examiner, administrative law judge, attorney, specially designated agent, general counsel, member of the Board, or other officer or employee of the Board shall produce or present any files, documents, reports, memoranda, or records of the Board or of the general counsel, whether in response to a *subpoena duces tecum* or otherwise, without the written consent of the Board or the chairman of the Board if the document is in Washington, D.C., and in control of the Board; or of the general counsel if

the document is in a regional office of the agency or is in Washington, D.C., and in the control of the general counsel. * * *